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In the

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. ~~671, 678 & 756~~ 21, 22, 32

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, and PHILADELPHIA ELECTRIC COMPANY,

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

FEDERAL POWER COMMISSION,

v. *Petitioners,*

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS and LOYD B. SANDS, and THE SUPERIOR OIL COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 671, 678 & 756

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, and PHILADELPHIA ELECTRIC COMPANY,

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

FEDERAL POWER COMMISSION,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS and LOYD B. SANDS, and THE SUPERIOR OIL COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

Caroline and Loyd B. Sands, Placid Oil Company, and Margaret Hunt Hill, Trustee, Respondents in the captioned cases file this their joint Brief in Opposition and pray that the various petitions for the writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 14, 1964, be denied.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 335 F. 2d 1004 and is printed as Appendix B to the petition of United Gas Improvement Company, *et al.*, in Case No. 671 (pp. 9a-37a). The jurisdictional prerequisites are properly alleged in the respective petitions.

STATUTES INVOLVED

The pertinent provisons of the Natural Gas Act (Sections 4, 7, and 19), 52 Stat. 821 et seq. (1938 as amended, 15 U.S.C. 717-717w) are set forth in the appendix to the Petition in Case No. 756 (pp. 16-20) and in the related petition filed by Superior Oil Company in Case No. 776 (pp. 48-51).

QUESTIONS PRESENTED

1. Where gas has been dedicated to interstate use in reliance upon unconditioned permanent certificates of public convenience and necessity which are later judicially remanded for further consideration, may the Commission upon reconsideration refuse to receive and consider cost and economic evidence and still discharge its responsibility under Section 7(e) of the Natural Gas Act by making a limited inquiry as to whether the contract prices are in-line?

2. Where gas has been dedicated to interstate use in reliance upon unconditioned permanent certificates of public convenience and necessity which are later judicially remanded for further consideration, may the Commission upon

reconsideration, after fixing an initial rate without any consideration as to whether such rate is just and reasonable, impose a moratorium on the filing of Section 4 price increases as a condition to the re-issuance of permanent certificates of public convenience and necessity?

3. Where gas has been dedicated to interstate use under valid unconditioned permanent certificates which are later judicially remanded to the Commission for further consideration, may the Commission upon reconsideration, when the issue of confiscation has been timely raised, require retroactive refunds without first determining that the amounts required to be refunded were unlawfully collected?

STATEMENT

On September 4, 1958, the Federal Power Commission (Commission) issued its Opinion No. 315[1] which granted Respondents Margaret Hunt Hill, Trustee and Placid Oil Company unconditioned permanent certificates of public convenience and necessity authorizing sales of natural gas to Transcontinental Gas Pipe Line Corporation (Transco) at a price of 21.5¢ per Mcf plus 2.05¢ per Mcf tax reimbursement. After complying with the Commission's requirements regarding the filing of their respective gas purchase contracts, sales were initiated pursuant to this certificate authority. United Gas Improvement Company and others sought judicial review of Opinion No. 315. Although this opinion was

[1] 20 FPC 264 (1959).

first affirmed by the Court of Appeals for the Third Circuit,[2] it was subsequently summarily remanded to the Commission by this Court,[3] with instructions for "a reconsideration and redetermination in the light of *CATCO, (Atlantic Refining Company v. Public Service Commission of the State of New York*, 360 U.S. 378, 79 S. Ct. 1246 (1959))."

On August 10, 1959, the Commission issued its Opinion No. 327 wherein it similarly granted Respondents Caroline and Loyd B. Sands a certificate of public convenience and necessity to make sales of natural gas to Hope Natural Gas Company (Hope) at an initial price of 21.5¢ per Mcf plus a tax reimbursement of 2.05¢ per Mcf. Shortly thereafter, after filing their Gas Purchase Contract with the Commission, Respondents commenced deliveries of gas thereunder. Public Service Commission of New York (New York), however, sought judicial review of Opinion No. 327. Whereupon the Court of Appeals for the District of Columbia Circuit[4] reversed the Commission's order granting unconditioned certificates and remanded the case to the Commission with instructions to "hold further hearings in which Petitioners and other producer applicants might, if they so choose, to either augment the record so as to support certificate authorization without a price condition or to seek a certificate appropriately conditioned."[5]

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[2] *United Gas Improvement Company, v. Federal Power Commission*, 269 F. 2d 865 (3rd Cir., 1959).

[3] *PSC v. Federal Power Commission*, 361 U.S. 195 (1959).

[4] *Public Service Commission v. FPC*, 287 F. 2d 146, (D.C. Cir., 1960) cert. denied, 365 U.S. 880 (1961).

[5] 287 F. 2d at pg. 150.

Thus it is the Commission's action following these judicial remands which is the subject of these appeals. Contrary to procedure followed by the Commission in other remanded proceedings,[6] when the foregoing judicial mandates were returned from the Courts of Appeals, the Commission did not take immediate action. Not until May 10, 1961, was each of the remanded proceedings consolidated with the Southern Louisiana Area Rate Proceeding, Docket No. AR61-2, *et al.* Some eight months later, without any hearing having been held in this area proceeding, on January 10, 1962, the Commission issued an order warning Respondents that the Commission might subsequently require as a condition to permanent certificate authorization that Petitioners make retroactive refunds of any revenues received from the subject sales to the extent, if any, that such revenues exceeded the rates ultimately found to be in accord with the requirements of the public convenience and necessity. On March 7, 1962, in denying Respondents' Application for Rehearing of the January 10 order, the Commission severed Respondents' respective certificate applications[7] from the Area Rate Proceeding in AR61-2 and consolidated them with other similarly remanded certificate proceedings for a "separate and expeditious disposition".

Pursuant to this March 7 order, hearings were commenced on July 18, 1962, ostensibly for the purpose of permitting

[6] In the remanded *CATCO* proceedings the Commission immediately issued temporary certificates containing refund clauses to replace the permanent certificates vacated by the Supreme Court.

[7] *Margaret Hunt Hill, Trustee*, Docket No. 14109; *Caroline Hunt Sands*, Docket No. G-17398; *Placid Oil Company*, Docket No. G-13183, G-13184.

Respondents to augment the record so as to support unconditioned certificate authority as directed or suggested by the judicial remands. However, a rather abbreviated hearing was held in which essentially all of the evidence offered by Respondents was rejected. After conclusion of such hearings, the Presiding Examiner issued an initial decision on December 7, 1962. Exceptions to this decision were filed by various parties. On July 17, 1963, the Commission issued its Opinion No. 398[3] in which it again granted permanent certificates of public convenience and necessity to Respondents and other producer applicants conditioned upon a reduction in initial price to 18.5¢ per Mcf plus 1.5¢ per Mcf tax reimbursement, and a refund with interest of all amounts previously collected in excess of that reduced price. In addition, a moratorium upon the filing of any price increase in excess of 23.55¢ per Mcf was imposed pending the issuance of final decision in Docket No. AR61-2 or until July 1, 1967, whichever is earlier.

After timely filing petitions for rehearing and reconsideration, Respondents filed Petitions for Review in the Court of Appeals for the Fifth Circuit alleging several errors made by the Commission. On August 14, 1964, the Court of Appeals for the Fifth Circuit issued its opinion in which it found that the Commission erred in these remanded proceedings in the following three respects: (1) excluding cost and economic evidence, (2) imposing a price moratorium on permanent certificates, and (3) ordering retroactive refunds without predicating the amount of refunds upon a "just and reason-

[3] *In Re Placid Oil Company, et al.*, Docket No. G-13183, *et al.*, 30 FPC 283, 30 FPC 682.

able" rate determination. In view of these findings, the Court did not consider other questions and errors urged by Respondents, namely as to the validity of the Commission's "in-line" price determination or the requirement that interest be paid on the amounts refunded.

REASONS FOR DENYING THE WRIT

The questions presented in each of the three petitions to which Respondents reply, although stated differently, in essence merely attack the principal holdings of the court below which reversed the Commission's action in remanded certificate proceedings. Each of the questions is carefully phrased by Petitioners to point up either (1) a question of great importance to the Commission's future regulatory responsibilities, or (2) a conflict between the Fifth Circuit and some decision of either this Court or some sister circuit court. In so doing, the Petitioners have lifted the Fifth Circuit's decision out of its context and have completely distorted the very limited frame of reference in which the issues therein were resolved by the court below. On both counts the Petitioners are wrong, and their petitions should be denied for the following reasons:

1. The Issues Presented Are Unique, and Are Not of Sufficient Importance to Warrant Intervention of This Court.

As the Court below recognized, this case is unique in many respects. The circumstances, i.e., remanded certificate proceedings, under which it was presented will likely never arise again. The fact cannot be overemphasized that it is the Com-

mission's action in a remanded proceeding which is under review rather than action in an initial certificate proceeding. Even the Solicitor General, on behalf of the Commission recognized that "* * * the ruling below is in terms confined to the rather unusual situation in which refunds are ordered because of the invalidation of the original certificate * * *" (Br., p. 14).[9]

Although the subject certificate applications were before the Commission for the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act, the unique circumstances under which they were presented, distinguishes them from the ordinary Section 7 proceeding. Unlike the usual certificate proceeding, the principal issue here was not an initial dedication of gas supplies to interstate commerce, but merely what conditions, if any, should be attached to the authorization for continued sales of gas which had been dedicated and flowing in interstate commerce for a period of five years. This retrospective nature of the Commission's inquiry clearly distinguishes these cases from the usual Section 7 certificate proceeding.

The typical Section 7 case involves the initial commitment of new sales of gas to the interstate market. In such cases, it is the Commission's function after careful analysis to prescribe, if necessary, any "conditions precedent to the entry of natural gas in interstate commerce", *FPC v. Hunt*, 376 U.S. 515. Under some circumstances, usually loss of lease,

[9] Although this reference was confined to the refund question, its logic applies with equal force to the other issues raised.

drainage, or need for the gas, prompt action may become imperative, thus precluding a detailed analysis of each particular sale. In such cases, the Commission may authorize the sales to commence immediately and defer until a subsequent proceeding a complete analysis of various aspects thereof. If in so doing, the Commission imposes a condition, the producer then has the option to either accept the conditioned temporary authorization, wait for a thorough analysis of his proposal at the hearing on permanent certificate authorization, or find another market for his gas.

Very different, however, are the circumstances under which the subject case was presented to the Commission. The subject sales were dedicated to interstate commerce, and deliveries commenced in 1958 and 1959. They were thus captives of the interstate market for under this Court's rule in CATCO,[10] gas once dedicated cannot be withdrawn from interstate commerce without Commission approval. Therefore the issue before the Commission on July 17, 1963, the date of its Opinion No. 398, did not involve an initial commitment of gas to interstate commerce. That issue had become moot in 1958. The sole issue before the Commission was what conditions, if any, should be attached to certificates authorizing the continued sales which had been dedicated to interstate commerce some four or five years earlier.

It was under these unique circumstances that the court below was presented with the questions of (1) whether the Commission should consider the cost and financial evidence, (2) whether refunds should be required without a determina-

[10] Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378 (1959).

tion that the prices collected were unlawful, and (3) whether a moratorium on future price increases was lawful. The issue of whether the Commission may impose these restrictions in the ordinary initial dedication Section 7 proceeding was not at issue in this case.

Thus when these distinctions are taken into account, not only does the correctness of the decision by the court below become obvious, but also the lack of necessity for any intervention by this Court. In this light, especially empty are Petitioners' various assertions of the urgency and importance of the questions presented. Particularly is this true of the Solicitor's complaint that "* * * the Fifth Circuit's ruling would entail a drastic enlargement in the scope of certificate proceedings * * *" As mentioned, the issues presented relate exclusively to the particular sales involved; their resolution does not bring into focus any general administrative policy regarding the issuance of certificates of public convenience and necessity.

Likewise, exaggerated is the Solicitor's assertion that this decision "* * * would increase administrative burdens to the point that the Commission's efforts to bring the producers of natural gas under effective regulation would be significantly impaired * * *" There is no doubt that the Commission's administrative burdens would be considerably easier if hearings were not required in issuing certificates under Section 7. Regulation by *fiat* is immeasurably simpler than regulation based upon hearings, evidence and argument. However, the undeniable fact is, that both the Natural Gas Act, *supra*, and the Administrative Procedure Act, 60 Stat. 237-244, 5 U.S.C.

§§ 1001-1011, prescribe that certificates shall be issued after hearings in which evidence and arguments are offered and received. Particularly is this true in this case where the Commission was operating under judicial directives from the Court of Appeals "to hold further hearings in which Petitioners * * * might * * * augment the record so as to support certificate authorization without price condition * * *", (*PSC v. FPC*, 287 F. 2d 146, 150) and from this Court for "* * * a reconsideration and redetermination in the light of CATCO," (*PSC v. FPC*, 361 U.S. 195). CATCO was reversed for lack of evidence not for the tender of too much evidence.

Furthermore, even in a normal certificate case, it is alarming to anticipate the adverse effect that the Commission's exclusive "in-line" price concept will ultimately have upon the interstate gas consumer. For if the issuance of certificates in Section 7 proceedings is restricted to an in-line determination, and the gas producer for legitimate reasons is forced to reject a proffered certificate because of the price level, there is no other procedure under the Natural Gas Act by which the Commission may make its statutory determination of whether the proposed sale "is or will be required by the present or future public convenience and necessity." The resultant effect is that the gas in such a case will be committed to another market and forever lost to the interstate gas consumer. Especially is this tragic when the circumstances may be such, that had the Commission merely heard the producers' case, it too would have concluded that because of other factors, the public convenience and necessity required the certification of the proposed sale irrespective of the in-

line price determination. Certainly such a possibility was contemplated by this Court in CATCO which called upon the producers to show the "reason why" their out-of-line prices should be certificated. However, irrespective of the normal certificate case, in the unique circumstances of this case, i.e., judicial remand for taking additional evidence, something more than the price-only approach was imperative.

Respondents would make clear that they do not agree that the Fifth Circuit was in all respects correct in its holding. For it seems obvious that insofar as it authorizes the Commission to order retroactive refunds the court has sanctioned a reparation order which this Court has held to be beyond the Commission authority, *FPC v. Hope Natural Gas Company*, 320 U.S. 591, 618. However, on balance the court's opinion is one which, in a difficult and unusual situation, is fair to all parties, industry and consumer interests alike, and should be upheld. Its full import in this rare situation simply requires that the rates during both the *prior* period (1958-1963) and the future period (1963-and following) be just and reasonable, no more and no less, except where prohibited by contract. What could be fairer? Neither party can then reap a windfall at the expense of the other.

2. The Decision of the Court Below Is Consistent With the Provisions of the Natural Gas Act and the Applicable Decisions of this Court and Is Not in Conflict with the Related Decisions of Other Courts of Appeals.

Each of the three petitions allege a conflict between the decision below and an assorted number of decisions by this

Court and other Courts of Appeals. Significantly, it is admitted, that some of the alleged conflicts are in the rationale of the decisions rather than in the decisions themselves. A careful examination of the cited decisions will, however, reveal a consistency rather than a conflict with the Fifth Circuit's decision. Most of the alleged conflicts are on their face without merit. As to the more vigorously asserted ones, Respondents would point out the following:

(1) *Exclusion of Evidence Issue:* The principal conflict alleged is with the Court of Appeals for the District of Columbia Circuit in *Public Service Commission of the State of New York v. Federal Power Commission (Skelly)*, 329 F. 2d 242, certiorari denied *sub nom. Prado Oil & Gas Co. v. Federal Power Commission*, 377 U.S. 963. Admittedly this decision sustained the issuance of permanent certificates conditioned upon a reduction in initial price to the "in-line" price level derived solely from prices for comparable sales. However, in context *Skelly* is clearly distinguishable from the decision below. In the first place, as the Solicitor's brief recognizes (p. 10), *Skelly* dealt solely with the problem of what weight to give the evidence once it had been admitted, whereas the Court below dealt directly with the question of the Commission's authority to exclude the evidence. There is a signal difference between the admissibility of evidence and the weight to be accorded such evidence. Moreover, the District of Columbia Circuit in *Skelly* did not make its holding exclusive; it specifically stated "* * * we need not hold that the Commission may never consider such evidence if the

circumstances in a particular case move it to do so consistently with its obligation under Catco" (329 F. 2d at p. 246). Since the evidence was here summarily excluded, the Court below did not even get to the question which was before the D.C. Circuit in *Skelly* therefore making the alleged conflict an impossibility. The Court below merely held that the Commission was required to receive and evaluate cost and economic evidence under the unique circumstances presented.

Moreover, as the Court below recognized, the evidence in *Skelly* was much more limited than the evidence tendered in this case. It is pure speculation to presume that the D.C. Circuit would have reached the same result in *Skelly* had the evidence there been as extensive and of the same nature as the evidence which was before the Court below in this case.

It is further pertinent that the issue in the *Skelly* case was primarily restricted to the proper determination of the price line. It also essentially involved an initial dedication of gas to the interstate market; its purport was therefore almost entirely prospective in nature. By contrast, the present case involved a reopened proceeding remanded for the purpose of taking additional evidence and covered gas which had been irretrievably committed to interstate commerce five years earlier; its purport was *retroactive* as well as prospective in nature. Certainly different evidence may be required for these differing situations. The fact that the Commission may not be required to consider decisive, economic and cost evidence in the first instance does not mean that

it need not even admit and evaluate such evidence in the second instance.

(2) *The Moratorium Issue:* The asserted conflict on this issue is principally with the rationale of this Court's decision in *FPC v. Hunt*, 376 U.S. 515 and to some extent in Texaco,[11] CATCO,[12] and Mobile.[13] The Solicitor alleges that the opinion below subordinates Section 7 to Section 4, reasoning that since the Commission has the power "to prescribe conditions for the entry of natural gas into interstate commerce" it has unlimited powers to restrict Section 4 rate filings. This position is simply not well founded, and is itself in conflict with this Court's decisions in the above cited cases. Its practical effect is a complete subordination of Section 4 to Section 7, the reverse of that which the Commission now complains.

The interplay between Sections 4 and 7 of the Act, as the Court below recognized, has been clearly spelled out by this Court in *Hunt*. Although the Court in *Hunt* upheld a limited moratorium as a condition to temporary certificates, the Court noted precisely the point in time at which the rights of a producer and the powers of the Commission under Section 4 become applicable:

> "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of §4 become applicable. The gas has been permanently certificated into interstate commerce and the independent producer is then free to pursue

[11] *Federal Power Commission v. Texaco*, 377 U.S. 33 (1964).

[12] *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959).

[13] *United Gas Pipe Line Co. v. Mobile Gas Service Corporation*, 350 U.S. 332 (1956).

> the rate filing procedure of that section." (376 U.S. at p. 523)

This language is unequivocal. In it is the clear recognition that permanent certification is the point at which Section 4 becomes applicable. The Commission, however, in the present cases arbitrarily denied Respondents their Section 4 privileges as a condition to the re-issuance of *permanent* certificates. Following this Court's reasoning, the court below had no other alternative but to strike down the Commission's moratorium. Respondents submit that in this case the court below was correct in doing so.

Notwithstanding the Solicitor's assertion to the contrary, the Commission was here not exercising its power to "condition a producer's entry into the interstate market". (p. 12) When the previous five-year period (1958-1963) is coupled with the future four-year moratorium (1963-1967) it was in effect *freezing* prices for nine years, in some instances for the life of the properties.[14] This makes rather ridiculous the Solicitor's characterization of the moratorium condition as a "limited waiver of * * * contractual right to file price increases".

Further, as the court below recognized, this Court's decisions in *Texaco, Catco* and *Mobile* support this construction of the *Hunt* decision. Therefore the so-called conflict

[14] The drastic results may be illustrated by considering the plight of Respondents Caroline and Loyd B. Sands. As a result of a stay of the moratorium provision, a Section 4 price increase was filed on one of the sales initiated in 1958. The Examiner's initial decision found 24.55¢ to be a just and reasonable rate. During the course of the hearing, the sworn testimony projected the life of the property involved to be only 3 to 5 years or 1967. Thus the effect of the Commission's moratorium, if upheld, would be to deny for the life of the property a just and reasonable rate. Likewise the only sale involved in Respondent Placid Oil Company's Docket No. G-13184 has been terminated; the wells have been depleted and abandoned and the leases canceled.

on the moratorium issue is non-existent. Since the Court has previously spoken so clearly on the point now raised, there is no need for further elucidation.

(3) *The Refund Issue:* The principal conflict on this issue is again asserted to be with the D.C. Circuit's *Skelly, supra.* decision which upheld the Commission's power to order refunds of moneys collected under temporary certificates. Actually the Solicitor does not advance this argument with much fervor, admitting that this case is a "rather unusual situation" and that "the [refund] issue is not in itself of sufficient importance to warrant intervention of this Court". The only basis for requesting certiorari on this refund issue is in conjunction with the other issues raised by the Commission. Only UGI and New York seriously urge the granting of certiorari on this point. Respondents agree with the Commission's basic premise that the issue is not of sufficient importance to warrant intervention by this Court. Moreover the presence of other issues does not enhance its importance. If alone an issue is not important enough to merit the attention of this Court, then it is not, in concert with other issues.

Regardless, a careful review of *Skelly* on the refund issue reveals that there is no conflict. Significantly *Skelly* required as a condition precedent to ordering refunds a consideration by the Commission of the equities of the affected parties. In fact this was the very basis upon which *Skelly* was remanded to the Commission. The holding that equities must be considered without defining those equitable considerations is certainly not inconsistent with the holding of the court below which simply required in these circumstances

that refunds be predicated upon a just and reasonable price level. Actually by ordering refunds without looking beyond the "in-line" price as the Commission has here done, the Commission itself is in conflict with *Skelly*. The D.C. Circuit had the in-line price before it; had that been the sole basis upon which refunds were to be ordered, there would have been no reason to remand the case to the Commission for further consideration.

Respondents submit that if any conflict does exist, it is with this Court's holding in *FPC v. Hope Natural Gas Company*, 320 U.S. 591, which denies the Commission the power to make reparation orders. To the extent that the Court below authorizes retroactive refunds, it has authorized a reparation order. However, as indicated, Respondents are willing to accept as a package the Fifth Circuit's resolution of the issues in this "unusual situation."

CONCLUSION

For the foregoing reasons it is respectfully submitted that these Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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